

Can an Article V Convention be restrained?

"The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

- Constitution of the united States, Article V (emphasis added)

Efforts by the states since 1980 to call an amendments convention have fallen short because of fears that delegates would "run away" and try to radically alter or even abolish the entire Constitution.

Former Supreme Court Chief Justice Warren Burger warned:

"I have also repeatedly given my opinion that there is **no effective way to limit or muzzle the actions of a Constitutional Convention**. The Convention could make its own rules and set its own agenda. Congress might try to limit the Convention to one amendment or to one issue, but there is no way to assure that the Convention would obey. After a Convention is convened, it will be too late to stop the Convention if we don't like its agenda."

Advocates of an Article V Convention claim there is no need to worry, because:

Claim #1: "Under Article V, a convention's agenda must be limited to the topics outlined in the applications from state legislatures to Congress."

Fact: "Under Article V"? Nowhere in Article V is there a requirement that the "agenda must be limited to the topics outlined in the applications from state legislatures to Congress". Read it for yourself. Nothing in Article V even hints at this claim.

Claim #2: "State legislatures also determine how convention delegates are selected".

Fact: Again, this claim is not based on any wording found in Article V. Instead, Article V says, **"The Congress, ... on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments"**. Who does it say is in charge of calling the Convention? **Congress!** This clearly places the power over the Convention in the hands of Congress, not the State Legislatures.

Claim #3: An "Amendment Convention" is more limited in scope than a "Constitutional Convention".

Fact: This claim implies that there is a limit to the scope of an amendment. Is there any Constitutional limitation to what an amendment can change about the U.S. Constitution?

Yes, there are three limits, found in the ending to Article V. Two of them expired in 1808, and one remains in force:

“... no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”

Other than this one restriction, *there is no limit* to what can be changed in the U.S. Constitution by the amendment process.

Claim #4: "... any amendments drafted by a convention must be approved by three-quarters of the states -- 38 out of 50."

Fact: This claim *is* based on the wording in Article V. A similar, but more restrictive “safety net” was placed on the only other national amendment convention our nation has had, the 1787 convention, from which we were given the U.S. Constitution. The precedent 1787 set for ratification is that the *convention has the power to rewrite the rules for ratification*. They were given the requirement that 13 out of 13 state legislatures would be needed to ratify the proposed changes, after Congress had given their approval. In Article VII of the U.S. Constitution, **they changed this to 9 out of 13 state ratifying conventions** (not legislatures), **and they completely bypassed Congress!** They changed who would ratify, and what percentage of a majority would be required. With this precedent, any claims that the ratification process is a “safety net” against a “run away” convention should be viewed with skepticism. The current rules for ratification may not be upheld.

The delegates to a convention can select their own agenda, change just about anything they desire in the Constitution, and write their own rules for ratification.

No wonder that James Madison warned,

“If a General Convention were to take place for the avowed and sole purpose of revising the Constitution ... **an election into it would be courted by the most violent partisans on both sides ... [and] would no doubt contain individuals of insidious views, who, under the mask of seeking alterations popular in some parts ... might have the dangerous opportunity of sapping the very foundations of the fabric....** Having witnessed the difficulties and dangers experienced by the first Convention, which assembled under every propitious circumstance, I should tremble for the result of a second, meeting in the present temper in America.” [From a letter by James Madison to G.L. Turberville, November 2, 1788, emphasis added]

As Chief Justice Warren Burger also warned:

“Whatever gain might be hoped for from a new Constitutional Convention could not be worth the risks involved.”

Thank you for your consideration,

Robert Brown
Helena, MT

States Should Enforce, Not Revise, the Constitution!

The states should rein in our out-of-control federal government by enforcing the Constitution through nullification of unconstitutional federal laws, rather than by revising the Constitution through an inherently risky constitutional convention process.

by Larry Greenley

According to a Gallup poll published on October 13, 2010, 59 percent of Americans think the federal government has too much power. This represents a dramatic, 20-percent increase over the past seven years. Furthermore, we've all witnessed an amazing series of federal power grabs in the past few years: the bailouts, the government takeovers, the stimulus bill, the healthcare "reform" law known as ObamaCare, the financial regulatory law, the EPA's regulation of greenhouse gases, the trillion-dollar deficits. Among constitutionalists, libertarians, Tea Party activists, Republicans, and Independents, the common expression is that our federal government is "out of control."

The Tenth Amendment Movement

In 2008, Oklahoma state Representative Charles Key put into motion a new movement to rein in the federal government based on the Tenth Amendment, which holds that besides those few and defined powers expressly delegated by the Consti-

tution to the federal government, all other powers are "reserved to the States respectively, or to the people." Rep. Key's Resolution 1089 powerfully asserts:

THAT the State of Oklahoma hereby claims sovereignty under the Tenth Amendment to the Constitution of the United States over all powers not otherwise enumerated and granted to the federal government by the Constitution of the United States.

THAT this serve as Notice and Demand to the federal government, as our agent, to cease and desist, effective immediately, mandates that are beyond the scope of these constitutionally delegated powers.

Economics professor Walter E. Williams provided a major publicity assist to Rep. Key's effort with his nationally syndicated column on July 16, 2008, entitled "Oklahoma Rebellion." Dr. Williams concluded his article by saying: "State efforts, such as Oklahoma's, create a glimmer of hope that one day Americans and their elected

representatives will realize that the federal government is the creation of the states."

Over the next two years this "glimmer of hope" became a reality, as the Tenth Amendment movement spread rapidly throughout the nation. Already by the end of 2009, 38 states had introduced Tenth Amendment resolutions based on the Oklahoma model. By 2010, 21 states had passed a Tenth Amendment resolution in one or both houses, and five Governors had gone on to sign their state's resolution.

This unprecedented assertion of state sovereignty over those powers not delegated to the federal government by the Constitution reflects a widespread awakening of millions of Americans, and large numbers of state legislators, regarding the importance of reining in the federal government by insisting on adherence to the Constitution.

The Founders of our Republic did not intend that state nullification would be the ordinary means of reining in federal usurpations; the constitutional system they provided us relies primarily on the prudence and vigilance of the citizens to place

CONSTITUTIONAL CONVENTION



Oklahoma state Representative Charles Key spearheaded the Tenth Amendment Movement by introducing his Resolution 1089 in 2008 to claim sovereignty for the state of Oklahoma under the Tenth Amendment over all powers not granted to the federal government by the Constitution.

responsible men and women in Congress who will pass laws agreeable to the Constitution, and who will keep the executive and judicial branches from overreaching their bounds. The November 2010 congressional elections demonstrated that informed, responsible voters can indeed still “throw the bums out” who disregard the Constitution. However, it is very unlikely that the electoral changes were sufficient to effect the size of roll-back needed to cut the federal government back to its proper size and halt its unconstitutional interference in state, local, and personal matters. State nullification is a fail-safe feature inherent in the very makeup of our system of government as agreed to by the original 13 states.

Shall We Enforce the Constitution or *Revise* the Constitution?

The movement to restore the Constitution, however, has encountered a fork in the road. One path builds on the Tenth Amendment movement by introducing and passing measures in state legislatures to nullify various unconstitutional federal laws, such as federal firearms laws and ObamaCare. Let’s call this choice, “States Enforce the Constitution.” The adherents

of the second path seek to convince constitutionalists that what’s needed to rein in the federal government is a constitutional convention (Con-Con) as provided for by Article V of the Constitution to propose some new amendments to the Constitution. Let’s call this choice, “States Revise the Constitution.”

To make the correct choice, we must understand the problem — namely that all three branches of the federal government routinely disregard major portions of the Constitution, despite the fact that the original 13 states created a compact, or agreement, designating as their agent, a federal government composed of executive, legislative, and judicial branches with their powers enumerated in the Constitution.

Thus, the states must re-assert themselves soon as the parties to the original compact that established the federal government as their agent and enforce the Constitution, or face eventual extinction at the hands of the federal government. As James Madison wrote regarding the states, “There can be no tribunal above [the states’] authority, to decide in the last resort, whether the compact made by them be violated.”

The enforcement-through-state-nulli-

fication route builds on the ideas of the Founders and posits that the states, which created the federal government in the first place, can begin re-asserting themselves immediately by virtue of their superior status as the creators of the federal government and by using those powers never delegated to the federal government. In contrast, revising the Constitution through an Article V convention would not immediately reassert the dominance of the states over the federal government; hence, the federal government would be permitted to continue to operate according to its self-assigned role as ultimate arbiter of violations of the constitutional compact. This in turn would delay the necessary reassertion by the states of their superior status over the federal government while everyone is kept waiting for a possible realignment of state-federal power to emerge from an Article V constitutional amendment process. Meanwhile, the federal government would continue to increase its control over the states and their citizens — taking our freedoms, rights, and money.

The Constitution and State Nullification

None other than Thomas Jefferson provided the rationale for the states to rein in an errant federal government by enforcing the Constitution through nullification. In 1798, both Jefferson and James Madison were greatly alarmed and personally threatened by the unconstitutional Alien and Sedition Acts that had been passed by the Federalists. It is very significant that they didn’t recommend the convening of a new constitutional convention as provided for by Article V of the Constitution.

Not only did Jefferson completely ignore an Article V constitutional convention as a remedy for what he considered an out-of-control federal government, he went on to provide us with both the conceptual framework and specific word for reining in such an out-of-control federal government — nullification. He did this with his Kentucky Resolutions of 1798 and 1799:

If those who administer the general government be permitted to transgress the limits fixed by that compact, by a total disregard to the special delegations of power therein contained, an annihilation of the

state governments, and the creation, upon their ruins, of a general consolidated government, will be the inevitable consequence.

Jefferson wisely warned that allowing the central government to be the sole judge of the extent of its own powers would result in "nothing short of despotism." He held further that "the several states who formed that instrument, being sovereign and independent, have the unquestionable right to judge of its infraction; and, *That a nullification, by those sovereignties, of all unauthorized acts done under color of that instrument, is the rightful remedy.*" (Emphasis added.)

Two hundred eleven years later, Jefferson's "rightful remedy" for unconstitutional actions by the federal government is very much alive. In 2010, historian Thomas Woods published his new book, *Nullification: How to Resist Federal Tyranny in the 21st Century*, which provides an overview of the many applications of the nullification concept in our nation's history. A leading current example is the national movement among state legislatures to nullify the "individual mandate" of the ObamaCare law. Since the "Freedom of Choice in Health Care" model legislation was introduced in December 2008, it has been filed or pre-filed in 38 states. It has been enacted into law in six states (Arizona, Georgia, Idaho, Louisiana, Missouri, and Virginia), passed but vetoed by the Governor in Florida and Oklahoma, and placed on the November

2, 2010 ballot as a constitutional amendment in Arizona, Colorado, and Oklahoma. On November 2, Oklahoma voters passed a constitutional amendment to nullify the individual mandate of ObamaCare by 65 percent to 35 percent, Arizona passed its amendment by a vote of 55 percent to 45 percent, and Colorado narrowly rejected its amendment by a vote of 47 percent to 53 percent.

Although this partial nullification of the unconstitutional ObamaCare law is a good first step, two leading supporters of the Tenth Amendment movement, The John Birch Society and the Tenth Amendment Center, have introduced model legislation for state nullification of the entire ObamaCare law. Since the individual mandate is such a tiny portion of the ObamaCare law, and since the unconstitutional remainder of the law would be more than enough to complete a government takeover of our nation's healthcare system even without the individual mandate, the entire ObamaCare law should be nullified.

Revision Risks Great Under Con-Con
In contrast to the state nullification path, attempting to rein in the federal government by revising the Constitution through a new constitutional convention convened according to Article V is inherently very, very risky.

James Madison himself, father of the Constitution, warned against convening a second constitutional convention. When he learned that New York and Virginia were actively calling for an Article V convention in 1788, just months since ratification of the Constitution, he was horrified.

The major risks are:

- Once called, a constitutional convention becomes its own authority and cannot be limited;
 - A corollary to the point above is that a Con-Con may become a "runaway convention" that drastically alters our form of government, or throws out the Constitution altogether and establishes an entirely new system of governance.
 - It is absurd to believe that a majority (or even a sizable minority) of the individuals likely to be delegates to a Con-Con today would compare favorably with our nation's Founders or share their commitment to liberty and limited government.
 - The general public's understanding of our Constitution has deteriorated greatly, while dependence on government programs has dramatically escalated since our founding, with both of these factors militating for bigger and bigger government.
- Nevertheless, a number of organizations are lobbying furiously for a Con-

Figure 1: In the 1970s and '80s, 32 state legislatures passed calls for a constitutional convention (Con-Con) to propose a Balanced Budget Amendment (BBA) to the U.S. Constitution.

BBA Con-Con calls:

AL, AK, AZ, AR, CO, DE,
*FL, GA, ID, IN, IA, KS, LA,
MD, MS, MO, NE, NV, NH,
NM, NC, ND, OK, OR,
PA, SC, SD, TN, TX,
UT, VA, WY

*FL rescinded its Con-Con calls in 1988 but passed a new BBA Con-Con call in 2010.



Con, so we will spend most of the rest of this article detailing why convening one is inherently dangerous, focusing on the four points mentioned above. Con-Con advocates appeal to various constituencies with proposed amendments to require a balanced federal budget, term limits for Congress, a presidential line-item veto, as well as a number of other proposals. Article V of our Constitution, they point out, provides for calling a Con-Con upon "the Application of the Legislatures of two thirds of the several States." Which means that once 34 states apply for a Con-Con, Congress *must* initiate a convention.

Con-Con proponents argue that worries over whether the convention may exceed its mandate are unfounded, since the state legislatures can limit the Con-Con to consideration of a single issue, such as a balanced budget amendment. However, against these unsupported assurances, we respond with the learned opinions of jurists and constitutional experts from the Founding era to the present, as well as with the unanswerable argument of experience.

James Madison himself, father of the Constitution, warned against convening a second constitutional convention. When he learned that New York and Virginia were actively calling for an Article V convention in 1788, just months since ratification of the Constitution, he was horrified. He counseled:

If a General Convention were to take place for the avowed and sole purpose of revising the Constitution, it would naturally consider itself as having a greater latitude than the Congress.... It would consequently give greater agitation to the public mind; an election into it would be courted by the most violent partisans on both sides ... [and] would no doubt contain individuals of insidious views, who, under the mask of seeking alterations popular in some parts ... might have the dangerous opportunity of sapping the very foundations of the fabric.... Having witnessed the difficulties and dangers experienced by the first Convention, which assembled under every propitious circumstance, I should tremble for the result of a second, meeting in the present temper in America. [From a letter by James Madison to G.L. Turberville, November 2, 1788]

There in a nutshell you have the basic warning by The John Birch Society, the Eagle Forum, the American Policy Center, and many other constitutionalist organizations, against the convening of an Article V constitutional convention.

Madison clearly did not believe that a Con-Con could be limited and trembled at the thought of one. Madison's view that it is impractical, or even impossible, to limit a Con-Con is shared by a wide array of jurists

and legal scholars, including noted Democrats and Republicans, liberals, conservatives, and libertarians. Among those who have addressed this issue are former Chief Justice of the United States Supreme Court Warren E. Burger, former U.S. Supreme Court Justice Arthur J. Goldberg, Prof. Lawrence H. Tribe of Harvard Law School, Prof. Charles E. Rice of Notre Dame Law School, Prof. Thomas I. Emerson of Yale Law School, and Prof. Gerald Gunther of Stanford University Law School.

No Protection Against Runaway Convention

Another scholar who has weighed in on this issue is Judge Robert Bork, who served as Solicitor General, acting Attorney General, and judge for the United States Court of Appeals for the District of Columbia Circuit. In a letter to State Representative Reese Hunter of Utah on January 16, 1990, Judge Bork stated:

Specifically, you asked for my opinion on the question: "Can a constitutional convention be limited by Congress or the states to a single issue?" ... It is my view ... that a federal constitutional convention could not be limited to a single issue.... The original Philadelphia convention went well beyond the purposes for which it was called and nobody has suggested the Constitution is a nullity for that reason.

Figure 2: Since 1988, 16* states have rescinded all of their constitutional convention calls.

Rescinded Con-Con calls:

AL 1988, LA 1990, OR 1999, ID 1999, UT 2001, ND 2001, AZ 2003, VA 2004, SC 2004, GA 2004, MT, 2007, OK 2009, WY 2009, NH 2010, SD 2010, TN 2010

*FL had rescinded its Con-Con calls in 1988, but passed a new BBA Con-Con call in 2010.





Would we be more likely to be convening an experiment that would end up placing our Constitution, our liberty, and the future of our children's children in the hands of politicians of the ilk of Nancy Pelosi, Newt Gingrich, Harry Reid, John McCain, and Barney Frank?

Will Madisons and Washingtons Run a New Con-Con?

Historians and political observers from throughout the world have marveled at the constitutional creation that emerged from the Philadelphia convention of 1787. The caliber and character of the men involved in that great endeavor, all agree, were remarkable: George Washington, James Madison, Benjamin Franklin, Robert Morris, George Mason, Edmund Randolph, Rufus King, Roger Sherman, John Rutledge, et al.

Are we likely to see a similar constellation of statesmen should a new Con-Con be called? Or would we be more likely to be convening an experiment that would end up placing our Constitution, our liberty, and the future of our children's children in the hands of politicians of the ilk of

Nancy Pelosi, Newt Gingrich, Harry Reid, John McCain, and Barney Frank?

As noted above, not only must we contend with the fact that most of the politicians in power at the state and federal levels do not share the constitutionalist views of the Founders, but most of our fellow citizens are woefully uneducated regarding the Constitution. Very few have actually read it and fewer still have

read *The Federalist Papers*, which were written by Madison, Hamilton, and Jay as popular essays to explain the Constitution to the American people of their day.

Pro Con-Con Organizations Are Lobbying State Legislators

Space does not permit the listing of all the organizations and individuals that are contacting state legislators this winter with the goal of influencing at least 34 state legislatures to introduce and pass a resolution during the 2011 session petitioning Congress to call an Article V constitutional convention to propose one or more amendments. However, here's a statement from just one of the pro Con-Con organizations that shows how organized and committed they are to getting their model Con-Con call resolution passed by 34 states in 2011:

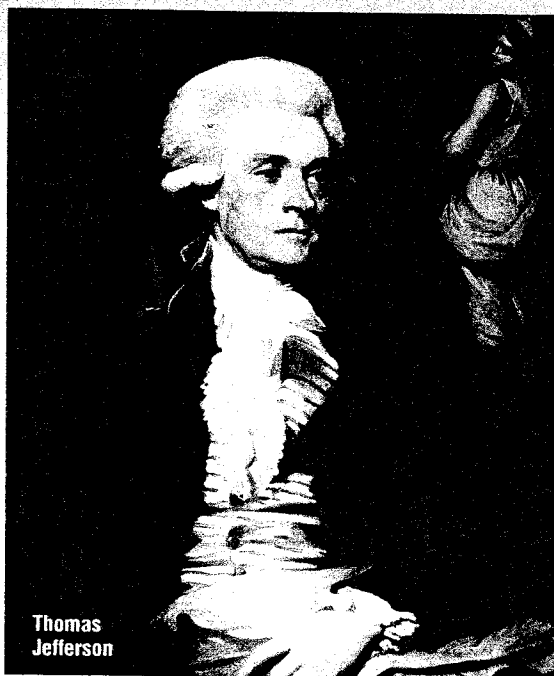
In January of 2011 history will be made when the same Article V Convention Resolution is introduced in every state legislature in the United States. Never before has the same call for an Amendments Convention occurred at the same time. The 10 Amendments for Freedom organization is well on its way to having a sponsor in every state which will introduce the same resolution.

— 10 Amendments for Freedom, www.10amendments.org, August 4, 2010

Thirty Years of Con-Con Battles

This battle over whether to convene an Article V constitutional convention is not new. Back in 1983 Missouri became the 32nd state to petition Congress to convene a constitutional convention for the purpose of proposing a Balanced Budget Amendment (BBA).

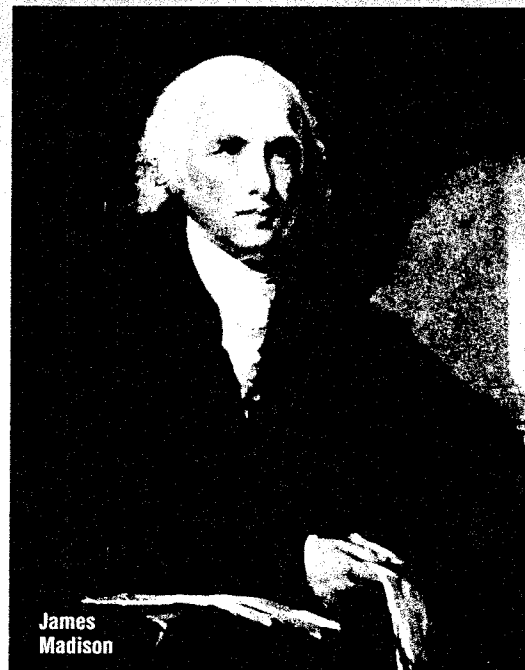
Since one of the major selling points for the pro Con-Con advocates is that state legislatures can restrict a constitutional convention as to which amendments or what subject matter can be considered, a separate count is maintained for the number of states that make a Con-Con call for each type of amendment(s). By this accounting only two more states would have been needed to force Congress to



Thomas Jefferson

Thomas Jefferson asserted the power of states to nullify unconstitutional federal laws based on their status as parties to the constitutional compact of 1787-88, in the Kentucky Resolutions of 1798 and 1799.

James Madison, father of the Constitution, warned against convening another constitutional convention because "individuals of insidious views ... might have the dangerous opportunity of sapping the very foundations of the fabric [of the Constitution]."



James Madison

convene a Con-Con to consider proposing a Balanced Budget Amendment.

About this time members of The John Birch Society (JBS) and their allies got involved in persuading state legislators in the remaining 18 states against issuing any more BBA Con-Con calls. Not only was the BBA Con-Con movement stopped dead in its tracks, but JBS members went on the offense and worked with state legislators to introduce and pass resolutions to rescind all previous Con-Con calls. Beginning with Alabama and Florida in 1988, a total of 17 state legislatures (Ala., Ariz., Ga., Idaho, Fla., La., Mont., N.D., N.H., Okla., Ore., S.C., S.D., Tenn., Va., Utah, and Wy.) have become so thoroughly convinced of the dangers of a constitutional convention that they have voted to rescind (take back) all previous Con-Con calls in their states. This total was reduced by one this year when Florida issued a new BBA Con-Con call. So the total of states that have rescinded their calls now stands at 16. See the maps for the 32 states that have issued BBA Con-Con calls (Figure 1) and the 16 states that have rescinded all of their previous Con-Con calls (Figure 2).

Persuade State Legislators to Enforce, Not Revise, the Constitution

If you would like to help in a grass-roots action project in your state to rein in the federal government by (1) persuading state legislators to enforce the Constitution through nullification of the entire ObamaCare law and other unconstitutional federal laws, (2) stopping the new drive to revise the Constitution by defeating all Con-Con call resolutions, and (3) preserving the Constitution by persuading state legislators to introduce and pass Con-Con rescission resolutions in those 34 states that haven't done so, then go to <http://www.JBS.org/StopObamaCare> and <http://www.JBS.org/StopACon-Con>. These are the web pages for two of The John Birch Society's highest priority action projects: "Choose Freedom — STOP ObamaCare" and "Choose Freedom — STOP A Con-Con."

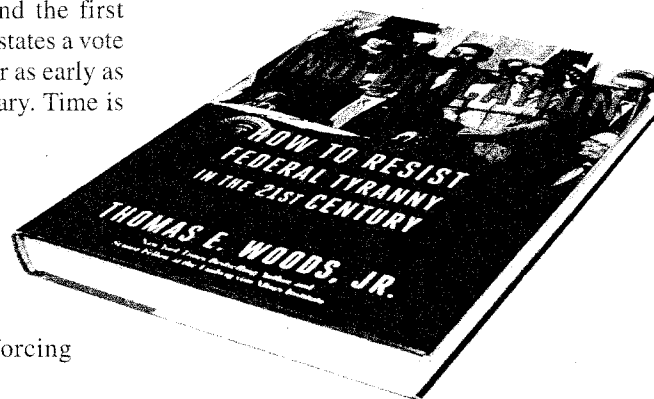
Given the two-year cycle of state legislatures whereby state legislators are elected in the general elections held in early November of even-numbered years and open their legislative sessions very

soon after January 1, the critical time for contacting state legislators regarding nullification of ObamaCare, blocking calls for a Con-Con, and rescinding all previous calls for a Con-Con is this present month of December 2010 and the first few months of 2011. In many states a vote on a Con-Con call could occur as early as the first week or two of January. Time is of the essence.

Preserve Our Freedom

If we are to preserve our freedom under the Constitution, then the states must rein in our out-of-control federal government by enforcing

the Constitution through nullification of unconstitutional federal laws, rather than by revising the Constitution through an inherently risky constitutional convention process! ■



Key Quotes

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

— Tenth Amendment, Bill of Rights, United States Constitution

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.

— Article V, United States Constitution

If a General Convention [convened by Congress according to Article V of the Constitution for the purpose of "proposing amendments" to the Constitution] were to take place [it] would no doubt contain individuals of insidious views, who, under the mask of seeking altera-

tions popular in some parts ... might have the dangerous opportunity of sapping the very foundations of the fabric [of the Constitution].

— James Madison, Letter to G.L. Turberville, November 2, 1788

Resolved... That the several states who formed that instrument [the Constitution], being sovereign and independent, have the unquestionable right to judge of its infraction; and, That a nullification, by those sovereignties, of all unauthorized [unconstitutional] acts done under color of that instrument, is the rightful remedy.

— Thomas Jefferson, The Kentucky Resolutions of 1799

The states, then, being the parties to the constitutional compact, and in their sovereign capacity, it follows of necessity, that there can be no tribunal above their authority, to decide in the last resort, whether the compact made by them be violated; and consequently, that, as the parties to it, they must themselves decide, in the last resort, such questions as may be of sufficient magnitude to require their interposition.

— James Madison, Virginia General Assembly Report of 1800



2011 Session

Exhibit: 6

**This exhibit is a 3-dimensional
item.**

**DVD entitled:
Beware of Article V**

**Therefore it cannot be scanned;
a photocopy of this exhibit has
been created to aid you in your
research.**

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and can be viewed at the
Montana Historical Society.**

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